

**Testimony of Mark Baker, representing Bresnan Communications in opposition to SB 369**

Senate Business and Labor Committee  
Thursday, February 8, 2007

Madame Chair, members of the Committee, for the record my name is Mark Baker. I am an attorney with Anderson & Baker and I am here today on behalf of Bresnan Communications in opposition to SB 369.

This issue is entering its second decade as a contested matter between the two private parties involved, Flathead Electric Cooperative (FEC) and the cable company, and it concerns me greatly that we are once again in front of the Legislature on this matter.

Prior to 1997, the cable system in the Flathead was attached to approximately 900 poles of the Flathead Electric Cooperative at reasonable rates.

In January, 1997, Flathead Electric increased its pole rates from \$7.60 a pole to \$12.67 a pole. The cable company, at the time TCI, contested the new rate and attempted to negotiate a more reasonable rate. FEC refused to negotiate and, in September, 1997, notified TCI that the pole attachment contract between FEC and TCI was terminated. FEC ordered the cable system to remove its facilities from its poles. TCI agreed to pay the increased price.

In November, 1998, FEC acquired the distribution facilities of Pacific Power and Light. The cable system was attached to more than 10,700 of Pacific Power's poles. The cable system was charged \$3.75 per pole. FEC honored the pole attachment contract until it terminated on December 31, 1999.

When Flathead Electric acquired Pacific Power and Light, it was forced to manage the newly acquired territory as a separate subsidiary, Energy Northwest Inc., because of the 3,500 population threshold for electric cooperatives operating in incorporated municipalities as defined in a 1939 Montana statute. Operating Energy Northwest as a separate subsidiary resulted in significant increased operating costs for FEC.

In 1999, FEC supported legislation that would have repealed the 1939 Act. This legislation would have provided Flathead Electric with substantial relief given its acquisition of Pacific Power and Light. The legislation died in committee.

In 2001, Flathead Electric brought forth legislation again, this time SB 325, seeking relief from the 1939 Act.

SB 325 in its introduced form failed to hold third parties such as the cable provider harmless. Where, prior to the FEC acquisition, the cable company was paying pole attachment rates consistent with the Federal Communications Commission formula, SB

325 in its original form would not have imposed the use of those formulas in the future. After much negotiation between FEC and the cable provider, the Legislature amended SB 325 to ensure that 3<sup>rd</sup> parties such as the cable company were held harmless and were charged pole attachment rates that were calculated using the FCC formula. The underlying measure SB 325, which granted FEC the primary relief it sought, was passed as amended by the Legislature in 2001 and enacted into law.

2003. Flathead Electric is able to consolidate its business operations, enjoying significant financial savings due to the passage of SB 325 in 2001. However, FEC decides to pursue legislation in the 2003 Legislature that would undo the agreement with respect to the pole attachment language worked out in the 2001 session. The legislation would result in at least doubling the rate for pole attachments. Ultimately, the bill was indefinitely postponed on the Senate floor, 49-0. (See "Senate kills measure on utility rates", by Jim Mann, The Daily Interlake.)

In the November, 2004 newsletter of the Flathead Electric Cooperative, "Watts Happening", FEC indicated that it would again pursue legislation in the 2005 Legislature. Ultimately, FEC decided against pursuing such legislation.

On October 23, 2006, Flathead Electric sent a letter to Bresnan Communications notifying Bresnan that they intend to assess Bresnan Communications more than twice the current assessment for pole attachment rates (from \$7.00 currently to \$14.26), beginning January 1, 2007, and further state that they believe they can charge as much as \$18.76 per pole. Flathead Electric attempts to justify its proposed rate increase because of their belief that Bresnan should no longer be classified as a cable provider, but rather as a telecommunications provider, and therefore subject to a different formula and a higher rate. (See letter from Kenneth A. Sugden, Flathead Electric to Sean O'Donnell, Bresnan Communications, October 23, 2006).

On October 27, 2006, Bresnan responded to Flathead Electric's October 23<sup>rd</sup> letter, disputing the notion that Bresnan is providing telecommunications services and FEC's interpretation. Bresnan offered to discuss this issue further with Flathead Electric. (See letter from Jerold C. Lambert, Bresnan Communications to Kenneth A. Sugden, Flathead Electric, October 27, 2006).

January, 2007...FEC proposes legislation again to repeal the provisions negotiated and agreed to in the 2001 Legislature. The effect of the legislation would allow FEC to charge any rate they want in what was previously a regulated utility territory, without limitation. At the same time, FEC invoices Bresnan Communications at a pole attachment rate that more than doubles the current assessment.

FEC's latest argument rests on their belief that Bresnan is a provider of "telecommunications services", and not a cable provider, and therefore should be complying with the FCC pole attachment rate formula that FEC says would allow it to charge \$18.76 per pole from the current charge of \$7.00 per pole. (see October 23, 2006 letter). In reality, cable VoIP services like Digital Phone remain distinctly classified as

"information services" as opposed to "telecommunications services" (see October 27, 2006 letter), although there is a pending matter in front of the Federal Communications Commission to review the proper classification of such services.

FEC's decision to seek relief once again with the Legislature by repealing the language from 2001 is overreaching and unnecessary, offering a solution where one already exists in current law. FEC believes that Bresnan Communications should be complying with the telecommunications services formula, and not the cable formula, and pay the corresponding rate. The statutory language contained in 35-18-104(2) currently allows FEC to do just that and as a result, it has invoiced Bresnan accordingly. Bresnan, as in **any contractual matter between private entities**, has the right to contest such charges and has done so. What this really boils down to is a contractual dispute between two business entities and the enforcement of Montana law. The proper forum for resolving such a dispute is not in the Legislature forcing it to pick winners and losers, but rather the courts and the judiciary based on the facts of the case and the applicable state law.

Bresnan Communications respectfully requests that the committee table SB 369. Thank you.

Respectfully submitted,

Mark Baker  
Attorney representing Bresnan Communications

Anderson & Baker  
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7 West 6<sup>th</sup> Avenue  
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Helena, MT 59624  
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October 23, 2006

Mr. Sean O'Donnell  
Regional Vice President and General Manager  
Bresnan Communications  
1860 Monad Rd.  
Billings, MT 59102

Re: Pole Attachment Rates

Dear Mr. O'Donnell:

Flathead Electric Cooperative (FEC) entered into a pole attachment agreement with your predecessor, AT&T. Under MCA 35-18-104(2), the rates, terms and conditions of any pole attachment agreement to which the cooperative is a party must use the formulas provided in the pole attachment rules of the Federal Communications Commission. The FCC rules mandate that for cable system operators which simply provide one-directional service to their subscribers, the pole attachment rate shall take into account only the useable space on a pole in determining the burden of the attachment. The rate for telecommunication providers and for cable systems that provide telecommunication services have to take into account both the useable and non-useable spaces on a pole.

Under the FCC regulations, a cable system operator is to notify the utility whose poles they contact, when they begin offering telecommunications services. Even though you haven't notified us, your advertising and calls to your Kalispell office confirm that you are offering telephone service with your system here. Since Bresnan Communications now provides telephone service to its subscribers in the Flathead Valley, the pole attachment rate for your company will henceforth be the same as the rate we charge the telephone company. Your pole attachment bill for 2007 will be at the higher rate based on both the useable and non-useable portions of the pole. For several years your rate has been \$7.00 per pole per year. The rate for 2007 will be \$14.26 per pole per year. You are being billed for 13,487 pole attachments on our system. Your rate is \$14.26 per pole, even though the FCC formula allows a rate of \$18.76 per pole on our system.

The FCC regulations also require that we give you 60 days notice of your rate increasing. Please consider this your notice for your pole attachment rate in 2007.

If you want to discuss this further you can reach me at 406-751-4401.

Very truly yours,

Kenneth A. Sugden  
General Manager

**BRESNAN**  
Communications

Bresnan Communications  
One Manhattanville Road  
Purchase, NY 10577-2596  
Tel: 914.641.3300  
Fax: 914.641.3301  
www.bresnan.com

Via Certified United States Mail, Return-Receipt Requested

October 27, 2006

Mr. Kenneth A. Sugden  
General Manager  
Flathead Electric Cooperative, Inc.  
2510 U.S. Highway 2 East  
Kalispell, MT 59901

Re: Pole Attachment-Telecommunications Rates

Dear Mr. Sugden:

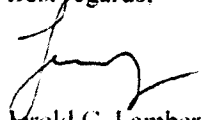
I am writing in response to your October 23, 2006 letter regarding the increasing rate for 2007 pole attachment fees for "telecommunications" attachments. The rates you quote are for companies providing telecommunications services. Bresnan is not providing telecommunications services for pole attachment purposes and therefore will not pay Flathead Electric an increased attachment rate.

Bresnan Communications is under no obligation to pay the telecommunications rate for any of its attachments on Flathead Electric's poles. Contrary to Flathead Electric's claim that Bresnan uses its attachments on Flathead Electric's poles to offer "telecommunications services," Bresnan's Digital Phone voice service is based on Internet Protocol technology and travels over a proprietary network. Indeed, while the Federal Communications Commission ("FCC") is currently considering the proper regulatory classification of all IP-Enabled services, including, cable Voice over Internet Protocol ("VoIP") services,<sup>1</sup> cable VoIP services, like Digital Phone, have never been classified as "telecommunications services."

In sum, unless and until cable VoIP is classified as a "telecommunications service" for pole rate purposes, Bresnan is not required to pay the telecommunications rate for its VoIP attachments.

Feel free to contact me if you would like to discuss this issue further.

Best regards,



Jerold C. Lambert  
Associate General Counsel

Cc: Robert Bresnan  
Sean O'Donnell

<sup>1</sup> *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 43 ("We invite commenters to address the proper legal classification and appropriate regulatory treatment of each specific class of IP-enabled services . . .") (2004).

JCL031306

# Senate kills measure on utility rates

By Jim Mann

The Daily Inter Lake

HELENA — A bill that would have boosted revenue for the Flathead Electric Cooperative at the expense of cable company providers — and possibly customers — was withdrawn just before a Senate vote Wednesday.

After heated discussion, the cooperative's board of directors could not agree on a formula for phasing in a rate increase for cable companies that attach their lines to cooperative transmission poles.

Senate Bill 335 included provisions that would at least double the rate, said Cory Swanson, a lobbyist representing Bresnan Communications, the company that is poised to take over cable operations across the state.

"The board couldn't concur that the bill was in the best interest of the members," said Doug Hardy, a lobbyist with the Montana Electric Cooperative Association.

The bill put the Legislature in the awkward position of choosing to benefit one company at the expense of another. And it raised the possibility of utility customers actually paying more for cable services.

"It's an unanticipated cost," Swanson said of the rates prescribed in the bill. "And whether we like it or not, an unanticipated cost has to be passed on to your customers."

The cooperative will benefit, Swanson said, "but ultimately it's not going to help their customers, because they could be paying for it on the other end."

Bresnan Communications was considering a surcharge on billing statements to clearly reflect the cooperative's rate increase, Swanson said.

"We're facing increased costs and if they have to be passed on to customers, we need to let them know where those costs came from," Swanson said.

Hardy said cable companies pay far less in pole attachment rates than telephone companies, and generally, the cooperative contends that it's not receiving enough for cable attachments.

- 35-18-311. Board of trustees — number — qualifications — removal — compensation — husband and wife.
- 35-18-312. Trustees — term — quorum — powers.
- 35-18-313. Voting districts.
- 35-18-314. Officers.
- 35-18-315. Authority to take acknowledgments — officer, trustee, or member.
- 35-18-316. Refunds to members — retention of unclaimed refunds.
- 35-18-317. Disposition or encumbrance of property.
- 35-18-318. Long-term indebtedness — membership approval.
- 35-18-319 through 35-18-324 reserved.
- 35-18-325. Duties of trustees and officers.
- 35-18-326. Trustee or officer conflict of interest.
- 35-18-327. Definitions.
- 35-18-328. Authority to indemnify.
- 35-18-329. Mandatory indemnification.
- 35-18-330. Court-ordered indemnification.
- 35-18-331. Determination and authorization of indemnification.
- 35-18-332. Insurance.
- 35-18-333. Application.

#### Part 4 — Merger, Consolidation, and Dissolution

- 35-18-401. Procedure for merger.
- 35-18-402. Procedure for consolidation.
- 35-18-403. Effect of merger or consolidation.
- 35-18-404. Dissolution of cooperative which has not commenced business.
- 35-18-405. Dissolution and winding up of cooperative which has commenced business.

#### Part 5 — Filings and Fees

- 35-18-501. Filings relative to incorporation, amendment, conversion, merger, consolidation, and dissolution — effect of filing — transmittal to county clerk.
- 35-18-502. Fees to be charged by secretary of state.
- 35-18-503. Exemption from taxes.
- 35-18-504. Repealed.
- 35-18-505. Repealed.
- 35-18-506. Repealed.
- 35-18-507 through 35-18-509 reserved.
- 35-18-510. Repealed.

#### Chapter Cross-References

Power and energy companies, Title 69, ch. 5.

### Part 1 General

**35-18-101. Short title.** This chapter may be cited as the "Rural Electric and Telephone Cooperative Act".

**History:** En. Sec. 1, Ch. 172, L. 1939; amd. Sec. 1, Ch. 80, L. 1957; R.C.M. 1947, 14-501.

**35-18-102. Definitions.** In this chapter, unless the context otherwise requires, the following definitions apply:

- (1) "Broadband" means transmission facilities capable of handling frequencies greater than those required for high-grade voice communication, higher than 4 kilohertz.
- (2) "Cable television system" means a system that receives and amplifies the signals broadcast by one or more television stations and redistributes the signals to subscribing members of the public for a fixed or periodic fee by wire, cable, microwave, or other means, whether the means are owned or leased.
- (3) "Cooperative" means a corporation organized under this chapter or a corporation that becomes subject to the provisions of this chapter.
- (4) "Member" means each incorporator of a cooperative and each person admitted to and retaining membership in a cooperative as provided by the articles of incorporation or bylaws of the cooperative, including persons admitted to joint membership.
- (5) "Person" includes any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or an agency of a state or political subdivision, or other organization or group of persons.

- (6) "Rural electric cooperative" means a corporation organized under this chapter for the purpose of providing electric service to its members.
- (a) an association of persons, including a town, village, or city, for the purpose of providing electric service to its members.
- (b) an association of persons, including a town, village, or city, for the purpose of providing electric service to its members.
- (c) a for-profit corporation.
- (d) an association of persons, including a town, village, or city, for the purpose of providing electric service to its members.

**History:** R.C.M. 1947; (2) 10, Ch. 7, L. 1957; amd. Sec. 1, Ch. 172, L. 1939.

**35-18-103.** any object, person, or thing, or similar object, person, or thing.

**History:** R.C.M. 1947; (2) 10, Ch. 7, L. 1957; amd. Sec. 1, Ch. 172, L. 1939.

**35-18-104.** pole regulation pursuant to the provisions of the act.

(1) are electric lines of communication.

(2) if the provisions of the act are not applicable to the formulas with attachment a.

**History:** En. Sec. 1, Ch. 172, L. 1939; amd. Sec. 1, Ch. 80, L. 1957; R.C.M. 1947, 14-501.

**35-18-105.** membership or participation in the electrical energy service.

(1) for the television service, telephone, cable, or other additional facilities.

(2) for the television service, telephone, cable, or other additional facilities.

(3) for the television service, telephone, cable, or other additional facilities.

**History:** En. Sec. 1, Ch. 172, L. 1939; amd. Sec. 1, Ch. 80, L. 1957; R.C.M. 1947, 14-501.

**35-18-106.** (a) sue and (b) have power to sue and (c) adopt a (d) become a cooperative or (e) construct, use, equip, maintain, or mortgage, pledge, or otherwise dispose of property.

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(6) "Rural area", as applied to all corporations organized under the provisions of 35-18-105(1), means:

(a) an area not included within the boundaries of an incorporated or unincorporated city, town, village, or borough having a population in excess of 3,500 persons on March 17, 1939, or subsequent to March 17, 1939;

(b) an incorporated municipality in which 95% or more of the premises are served by an electric cooperative on February 1, 1971;

(c) a former rural area annexed by a municipality and subject to 69-5-109; or

(d) an incorporated municipality that was served by a public utility that sold the public utility's distribution facilities within that municipality to an electric cooperative after January 1, 1998.

**History:** (1) En. Sec. 2, Ch. 172, L. 1939; amd. Sec. 2, Ch. 80, L. 1957; amd. Sec. 9, Ch. 7, L. 1971; Sec. 14-502, R.C.M. 1947; (2) En. Sec. 30, Ch. 172, L. 1939; amd. Sec. 1, Ch. 151, L. 1949; amd. Sec. 9, Ch. 80, L. 1957; amd. Sec. 10, Ch. 7, L. 1971; Sec. 14-530, R.C.M. 1947; R.C.M. 1947, 14-502(part), 14-530; amd. Sec. 1, Ch. 237, L. 1979; amd. Sec. 1, Ch. 208, L. 1981; amd. Sec. 2, Ch. 168, L. 1987; amd. Sec. 2, Ch. 406, L. 2001.

**35-18-103. Construction.** This chapter shall be construed liberally. The enumeration of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods, or things.

**History:** En. Sec. 31, Ch. 172, L. 1939; R.C.M. 1947, 14-531.

**35-18-104. Exemption from jurisdiction of public service commission — federal pole regulation.** Cooperatives and foreign corporations transacting business in this state pursuant to this chapter:

(1) are exempt in all respects from the jurisdiction and control of the public service commission of this state; and

(2) if they operate in a rural area described in 35-18-102(6)(d), shall use the formulas provided in pole attachment rules of the federal communications commission or successor formulas with respect to any matters pertaining to rates, terms, or conditions of any pole attachment agreement between themselves and any pole tenant or lessee made after April 28, 2001.

**History:** En. Sec. 29, Ch. 172, L. 1939; R.C.M. 1947, 14-529; amd. Sec. 3, Ch. 406, L. 2001.

#### Cross-References

Regulation of utilities, Title 69, ch. 3.

Utility lines and facilities provisions, Title 69, ch. 4.

**35-18-105. Permissible purposes for incorporation.** Cooperative nonprofit membership corporations may be organized under this chapter:

(1) for the purpose of supplying electrical energy and promoting and extending the use of electrical energy in rural areas, as provided in this chapter;

(2) for the purposes of making generally available adequate telephone service, cable television service, or broadband facilities through the improvement and expansion of existing telephone, cable television, or broadband facilities and the construction and operation of additional facilities as are required to ensure the availability of service to the widest practicable number of users of telephone service, cable television service, or broadband facilities; and

(3) for purposes allowable under federal authorization, including rural economic development activities.

**History:** En. Sec. 2, Ch. 172, L. 1939; amd. Sec. 2, Ch. 80, L. 1957; amd. Sec. 9, Ch. 7, L. 1971; R.C.M. 1947, 14-502(part); amd. Sec. 2, Ch. 237, L. 1979; amd. Sec. 1, Ch. 254, L. 1985; amd. Sec. 3, Ch. 168, L. 1987; amd. Sec. 1, Ch. 61, L. 1993; amd. Sec. 41, Ch. 7, L. 2001.

**35-18-106. Powers of cooperatives.** (1) A cooperative may:

(a) sue and be sued in its corporate name;

(b) have perpetual existence;

(c) adopt a corporate seal and alter the seal;

(d) become a member in one or more other cooperatives or corporations or own stock in other cooperatives or corporations;

(e) construct, purchase, take, receive, lease as lessee, or otherwise acquire and own, hold, use, equip, maintain, and operate and sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber: